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CONVERGENCE OF DIVORCE LAWS IN EUROPE

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Introduction

The question whether or not family law within Europe has been and is converging remains controversial.¹ Jacques Fayer wrote in 1978 that ‘a classical aphorism of comparative law, that while the law of property and obligations tends towards homogeneity, family law remains the seat of national idiosyncrasies [...] which has been beyond dispute for some ten year ago’² was losing its validity as ‘the laws of the majority of the countries of Western Europe tended to converge towards a uniform model, and this evolution has been very rapid.’³ This idea is supported up to the present day by some eminent contemporary scholars.⁴ At the same time the existence of convergence is persistently denied by another camp.⁵ Both sides are able to invoke empirical evidence as the history of family law in Europe includes both periods showing a clear tendency to divergence as well as periods when the convergence trend was dominating. Thus the mere choice of a period of investigation can be decisive for the outcome of one’s research.⁶ My hypothesis is that the different appreciation of the convergence/divergence tendency often has to do with the examination of too short-span periods. Studying the convergence issue it is quite easy to fall into the trap of selectiveness focusing only at those periods which tend to affirm one’s starting point.

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¹ See for the overview: Bradley, D., ‘A Family Law For Europe? Sovereignty, Political Economy and Legitimation’, in: Boele-Woelki, K. (ed), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, European Family Law Series No. 4, Intersentia, Antwerp, 2003, p. 89-90

² FOYER, J., ‘The Reform of Family Law in France’, in: CHLOROS, A., (ed.), *The Reform of Family Law in Europe*, Kluwer, Deventer, 1978, p. 75.

³ FOYER, J., ‘The Reform of Family Law in France’ (1978), p. 75.

⁴ ‘In Europe the movement towards uniformity is more evident [than in USA].’ PHILLIPS, R., *Putting Asunder: A history of divorce in Western Society*, Cambridge University Press, Cambridge, 1988, p. 570. In the same sense see also: Pintens, W., Vanwinckelen, C., *Casebook. European Family Law*, Leuven University Press, Leuven 2001, p. 16.

⁵ BRADLEY, D., ‘Convergence in Family Law: Mirrors, Transplants and Political Economy’, 6 *Maastricht Journal of European and Comparative Law* (1999), p. 128-150.

⁶ Willekens has rightly noticed that: ‘A purely synchronic comparison or one restricted to developments within, say, “recent years” or a certain decade, will easily miss the point and will give the impression of fundamental differences, where the a comparison over a more extended period of time would rather point to mere time lag.’ WILLEKENS, H., ‘Explaining Two Hundred Years of Family Law in Western Europe’, Vuga, The Hague, 1997, p. 60.

In this paper the convergence question will be approached via the search for the common core of the law on divorce throughout the last half millennium of its history. It will be argued that the tendency towards modernisation and liberalisation of divorce is generally apparent from the reintroduction of divorce after the Reformation in the Protestant countries in the 16th century up to the present day. To derive a tendency of convergence from this ongoing process of modernisation however, entails a patent shortcut.

During the described period divorce laws have evolved from fault-based divorce (divorce as sanction) to divorce based on the irretrievable breakdown of the marriage (divorce as remedy or failure) and divorce by mutual consent (divorce as an autonomous decision by the spouses themselves), and now probably is evolving even further: to the divorce on demand (divorce as a right). These different types of divorce law are inspired by different visions on the balance between the role of the state in the divorce process and the autonomy of the spouses. The first concept - divorce as sanction - is rooted in the idea of the state and/or the church as the guardians of universal morality, which have to punish the spouse who has committed a matrimonial offence and release the innocent spouse from the bond with the offender. The second concept - divorce as remedy or failure - is based on two assumptions: the communitarian idea that the state has to protect the stability of marriage for the sake of society at large, and a paternalistic belief that the spouses have to be protected from their ill-considered decisions to their own benefit. Therefore a divorce could only be granted when the competent authority was convinced that the marriage could not be saved. The third concept - divorce by mutual consent - is founded in the acceptance of the fact that nobody is in a better position to decide on the dissolution of the marriage than the spouses themselves. The fourth concept –divorce on demand - is inspired by the belief that a marriage cannot be kept intact if even one of the spouses wishes to terminate it. Consequently, divorce has to be granted upon the unilateral request of one of the spouses. These different concepts of divorce have taken shape in different times and could be perceived as various generations of divorce law.⁷ However, due to the dissimilarity in the timing of the liberalisation of divorce law in different countries, all four historical types are simultaneously present in contemporary Europe. This paper will thus first provide a brief historical overview of the

⁷ Phillips has developed an edifying, although not all-embracing periodisation of divorce law: first generation - the Protestant laws of the sixteenth century; second generation - 'the widespread legalisation and liberalisation of divorce legislation in the latter half of the nineteenth century', and third generation - the non-fault movement of the 1960s –1970s. Phillips, R., *Putting asunder* (1988), p. 571.

appearance of the different divorce law generations and then search for the common core of the current divorce law on the basis of a new source of information: the National Reports⁸ of the Commission on European Family Law (CEFL).⁹

The Protestant Reformation: Appearance of Fault-Based Divorce

Before the Reformation the doctrine of the indissolubility¹⁰ of marriage was one of the most important parts of the canon law on marriage and divorce of the Roman Catholic Church which was the uniform law of the whole area of Western Christendom.¹¹ This is the medieval *ius commune* for family law, the initial point from which the process of the development of the law on divorce in Western Europe¹² originally started. From this time onwards, using the portrayal by Phillips, ‘for the most part, the history of divorce since the sixteenth century has been one movement away from the Roman Catholic doctrines of marriage.’¹³

After the Reformation Western Europe became split into Catholic and Protestant camps. The former strictly adhered to the doctrine of the indissolubility of marriage while the latter allowed full divorce and remarriage.¹⁴

The historically first¹⁵ notion: a fault-based divorce as sanction, was initially elaborated in Protestant theological thought. Protestant reformers considered that the dissolution of marriage was not to be seen ‘as a remedy for marriage breakdown as such but as a punishment for

⁸ At the beginning of 2002 the CEFL produced detailed national reports on the grounds for divorce, representing twenty-two European jurisdictions. The integral reports are to be found on the CEFL website: www.law.uu.nl/priv/cefl. These reports have been compiled by national experts - members of the CEFL on the basis of a questionnaire specially drafted for this purpose. In 2003 these reports were compiled in two volumes structured along the lines of each question posed in the questionnaire, so after each question the answers given by each country report are provided. See: Boele-Woelki, K., B. Braat, B., Sumner I., (eds), *European Family Law in Action*, Volume I: Grounds for Divorce, European Family Law Series No. 2, Intersentia, Antwerp, 2003; Boele-Woelki, K., B. Braat, B., Sumner I., (eds), *European Family Law in Action*, Volume 2: Maintenance Between Former Spouses, European Family Law Series No. 3, Intersentia, Antwerp, 2003. Further referred to by reference to the author and the jurisdiction of the National Report only.

⁹ Established in 2001 as an academic initiative in order to elaborate *The Principles of European Family Law* that could provide a model for voluntary bottom-up harmonisation of family law in Europe.

¹⁰ Indissolubility only became really enforced in the eleventh - twelfth centuries and was formally made a part of canon law by the *Tametsi* decree of the Council of Trent (1563). Phillips, R., *Putting asunder* (1988), p. 27.

¹¹ The Orthodox Eastern European countries were, strictly speaking, never part of this *ius commune*.

¹² In the Orthodox Eastern European countries the doctrine of indissolubility has never completely prevailed. Divorce and remarriage remained available subject to a very restrictive procedure and for a very few grounds comparable to those developed by the early Protestantism.

¹³ Phillips, R., *Putting asunder* (1988), p. 1.

¹⁴ Lacey, T., *Marriage in Church and State*, SPCK, London, 1947, p.150.

¹⁵ After the re introduction of divorce following the period of indissolubility.

matrimonial crime and as a relief for the victim of the crime'.¹⁶ Therefore the petitioner had to be demonstrably innocent and many divorce laws only permitted remarriage for the innocent spouse.¹⁷ The guilty spouse had to be severely punished 'if not by death, then by banishment or imprisonment or fine'.¹⁸ Although during the Protestant Reformation the formal dissolution of marriage became possible, it is difficult to ascribe the Protestant theologians any intention to liberalise the family law.¹⁹ The introduction of divorce in the Reformed countries was therefore by no means a recognition of the individual's liberty to escape from an unhappy marriage. Divorce, irrespective of the competent authority (state or ecclesiastical), was strictly regulated and extremely difficult to obtain.²⁰

All protestant reformers unanimously accepted adultery as a ground for divorce,²¹ and most of them also accepted desertion.²² More liberal Lutheran reformers, notably Bucer and Zwingli, advocated additional grounds.²³ The husband and the wife had an equal right to sue for divorce. The theologians of the Church of England were initially also inclined to admit divorce;²⁴ however, in the early seventeenth century it became clear that a full divorce was not accepted by the Church of England.²⁵

Divorce based on the 'biblical' Protestant grounds started to spread all over Protestant Europe in the early sixteenth century. The Lutheran theology influenced the divorce law in Scandinavia and Germany. Calvin's teaching on marriage influenced the French Huguenots, The Dutch, the Scottish Presbyterians, and The English Puritans.²⁶ England remained the only protestant country that retained the doctrine of the indissolubility of marriage and did not

¹⁶ Phillips, R., *Putting asunder* (1988), p. 90.

¹⁷ Phillips, R., *Putting asunder* (1988), p. 90.

¹⁸ Lacey, T., *Marriage in Church and State* (1947), p. 149.

¹⁹ Harrington has noticed that 'it would be difficult to characterise [the Protestant reformers'] overwhelming concern with sexual order and discipline as "progressive," yet this has all too often been the case among scholars of the Reformation when referring to the reintroduction of divorce'. HARRINGTON, J., *Reordering Marriage and Society in Reformed Germany*, Cambridge Univ. Press, Cambridge, 1995, p. 90. For an opposite view see: OZMENT, S., *When Fathers Ruled: Family Life in Reformation Europe*, Harvard University Press, Cambridge, Mass., 1983, p. 99 ff.

²⁰ The same equally applies to the availability of divorce in the Orthodox countries of Eastern Europe.

²¹ Witte, J., *From Sacrament to Contract. Marriage, Religion, and Law in Western Tradition*, Westminster John Knox Press, Louisville, 1997, p. 68.

²² Although in Calvin thought desertion was not merely a separate divorce ground but a virtual form of adultery. Witte, J., *From Sacrament to Contract* (1997), p. 102.

²³ Witte, J., *From Sacrament to Contract* (1997), p. 69.

²⁴ Influential theologians proposed a limited legalisation of divorce in the late sixteenth/early seventeenth century. Stone, L., *Road to Divorce. England 1530-1987*, Oxford Univ. Press, Oxford, 1990, p. 303.

²⁵ Stone, L., *Road to Divorce. England 1530-1987* (1990), p. 305.

²⁶ Witte, J., *From Sacrament to Contract* (1997), p. 126.

introduce a full divorce after the Reformation.²⁷ However, after 1670 it became possible to obtain a divorce by a private act of Parliament.

Was there any convergence tendency in respect of family law during the early Reformation? The answer to this is a question of perception. On the one hand, the main event in Western Europe was the transformation from the uniformity of Roman Catholic canon law to the Protestant-Catholic dichotomy in the first place, and the mutual diversity among the Protestant laws in the second place. On the other hand, the Reformation was an extra-national phenomenon. The states influenced by the same denomination or Reformed thought had similar divorce laws.²⁸

The Protestant doctrine regarding marriage and divorce was not a radical break with canon law. This tempted many scholars to underplay the divergence between the Protestant and the Catholic marriage and divorce laws.²⁹ Some academics even went so far as to claim that the medieval *ius commune* continued to exist in spite of the Reformation.³⁰ There were also suggestions that despite the Protestant rejection of the Catholic doctrine of the indissolubility of marriage the 'attitude towards divorce was also not so radically different in practice as [...] the nondissolubilist - dissolubilist dichotomy might suggest.'³¹ However, regardless of how valid these arguments may be, it is quite clear that divergence advanced with the coming of the Reformation. In the protestant countries divorce, for the first time after centuries of dominance by Catholic doctrine, became possible again. And this difference cannot be underrated.

²⁷ Partly due to historical accident, partly due to 'the tortuous and zig-zag path by which it moved from the Catholic into the Protestant camp' Stone, L., *Road to Divorce. England 1530-1987* (1990), p. 301.

²⁸ For instance the reform of marriage law in England in the spirit of the Reformation was much slower and far less radical than on the continent. Helmholz, R., *Marriage Litigation in Medieval England*, Cambridge University Press, Cambridge, 1978, p. 3.

²⁹ As Glendon assumed, 'secular government simply took over much of the ready-made set of the canon law'. (Glendon, M.A., *The Transformation of Family Law*, The University of Chicago Press, Chicago and London, 1989, p. 31.) Esmein proposed that the Catholic notion of marriage was being reused in the protestant countries 'like a twig being detached from the trunk and planted in the soil.' Esmein, A., *Le mariage en Droit Canonique*, p. 34.

³⁰ So Safley alleged that both Protestant reforms and the Tredentine reform of marriage and divorce law 'were isolated elements in a far larger marital code, which remained unchanged upon both sides of the religious division of the period'. (Safley, T., *Let No Man Put Asunder: The Control of Marriage in the German Southwest. A Comparative study 1500-1600*, Sixteenth Century Journal Publishers, Kirksville, 1984, p. 38.) And Witte affirmed that 'canon law remained part of the common law (*jus commune*) of Protestant and Catholic Europe until the legal reforms and codification movement of the later eighteenth and nineteenth centuries.' Witte, J., *From Sacrament to Contract* (1997), p. 44.

³¹ 'The reluctance of the Catholic church's courts to act in separations *a mensa et thoro* and in annulments of marriages, which has been documented by scholars such as Helmholz, is strongly reminiscent of the policy of the courts of the Protestant states apparently applied in respect of divorce.' Phillips, R., *Putting asunder* (1988), p. 93.

Enlightenment and the French Revolution: The Cradle of the Modern Attitude Towards Divorce

The period of Enlightenment was the cradle of the concepts of divorce as the breakdown of marriage and divorce by consent. The Enlightenment thinkers developed some basic arguments for liberal divorce which have not lost their validity until the present days.³² Not only much of the modern philosophy of divorce was introduced at that time, but also the political colour of the advocates and opponents of the liberalisation of divorce that would persist over the centuries, started to become clear. The church for the first time in almost a millennium had lost the lead in developing marriage and divorce doctrine. Both Catholic and Protestant churches had to reposition from the instigator and promoter of the legal changes to the opponent of the changes inspired by secular promoters. Henceforth (apart from a few exceptions), a common tendency of association of political liberalism with adherence to liberal divorce law and of political conservatism with adherence to a restrictive attitude towards divorce became visible.³³

The thinkers of the Enlightenment developed a contractarian secular theory of marriage,³⁴ based on deism, individualism, and rationalism.³⁵ The French *Philosophers* embraced a new individualistic view of marriage as a union based on the sentiment of love³⁶ and as a ‘means to personal happiness’, leaving behind the old communitarian vision of marriage as a ‘conventional social and economic relationship.’³⁷ Such a perception naturally necessitated a change in the notion of divorce. The theorists of the French Enlightenment no longer saw divorce as a punishment for an offence but as a remedy for the breakdown of marriage,³⁸ and they proposed that the divorce grounds should be expanded beyond matrimonial fault.³⁹ They also saw divorce

³² In the course of the twentieth century the Enlightenment contractual model of marriage ‘slowly eclipsed Protestant and Catholic models of marriage and the ideas and the institution that those models have introduced into the Western legal tradition.’ Witte, J., *From Sacrament to Contract* (1997), p. 196.

³³ Phillips admitted that, although this is a generalisation and that it is easy to point to the exceptions, ‘[i]n general, though, the associations of political liberalism with positive attitude towards divorce, and political conservatism with negative attitudes towards divorce, are a useful rule of thumb.’ Phillips, R., *Putting asunder* (1988), p. 534.

³⁴ Witte, J., *From Sacrament to Contract* (1997), p. 196.

³⁵ Witte, J., *From Sacrament to Contract* (1997), p. 197.

³⁶ Traer, J., *Marriage and the Family in the Eighteenth-Century France*, Cornell Univ. Press, Ithaca, 1980, p. 70-71.

³⁷ Traer, J., *Marriage and the Family in the Eighteenth-Century France* (1980), p. 49.

³⁸ Phillips, R., *Putting asunder* (1988), p. 172.

³⁹ For instance, Morelly advocated divorce by mutual consent or unilaterally, Phillips, R., *Putting asunder* (1988), p. 166.

as a means to improve the position of women, 'as the ability of women to divorce would be a useful counterweight to male authority.' Therefore Montesquieu proposed to grant the right to unilateral repudiation only to women.⁴⁰

The Enlightenment thought inspired a whole wave of reforms of family laws emanating from sources as different and the Enlightened monarchs and the French Revolution.

The most significant of the codifications inspired by the Enlightenment ideas was the 1794 *Allgemeines Landrecht für die Preussischen Staaten* of Frederick William of Prussia. For the first time since Roman times divorce by mutual consent was re-introduced for the childless couples.⁴¹ A real innovation was allowing divorce on the ground of irretrievable breakdown of marriage.⁴² the childless couples could also dissolve their marriage in case manifested such 'fierce and deep hatred' of one spouse towards the other 'that there was no hope of reconciliation or achieving the goals of marriage.'⁴³

Under the *Ancien Régime* marriage was indissoluble in France in compliance with the Catholic doctrine. The Divorce law of 20 September 1792 enacted during the high-point of the Revolution 'gave France one of the most liberal and permissive divorce policies that have ever been applied on a national basis in the Western society.'⁴⁴ Besides a broad number of specific grounds, divorce was permitted by mutual consent and on the ground of incompatibility of temperament.⁴⁵ Divorce was introduced 'almost solely for the ideological reason that the facility to dissolve a marriage was an indispensable element of the freedom the revolution bestowed upon the French people'.⁴⁶ Revolutionary divorce law was attacked immediately after the Thermidorian seize of power. At the time of the Directory divorce became 'a political symbol, rather than simply one aspect of marriage and family law'⁴⁷ for both its republican defenders and conservative adversaries. During the Napoleon Empire unilateral divorce for reasons of incompatibility of temperaments was abolished, but divorce by mutual consent was retained in

⁴⁰ Phillips, R., *Putting asunder* (1988), p. 171.

⁴¹ MÜLLER-FREINFELS, W., *Ehe und Recht*, Mohr, Tübingen, 1962, p. 22.

⁴² BONE, E., VON, 'Comparaison entre le droit au divorce dans la République Batave (1798-1806) et dans l'*Allgemeines Landrecht für die der Preussischen Staaten*' (2001), p. 173-186.

⁴³ Para 718a of ALR.

⁴⁴ Phillips, R., *Putting asunder* (1988), p. 159.

⁴⁵ Phillips, R., *Family Breakdown in Late Eighteenth Century France. Divorces in Rouen 1792-1803*, Clarendon Press, Oxford, 1980, p. 11-12.

⁴⁶ Phillips, R., *Putting asunder* (1988), p. 180.

⁴⁷ Traer, J., *Marriage and the Family in the Eighteenth-Century France*' (1980), p. 129.

the *Code Civil*, although it became ‘nearly a dead letter’⁴⁸ because it was subject to many restrictions.⁴⁹

The nineteenth century started with the triumphal spread of French divorce law, albeit in the moderate form of the *Code Civil*. The export of the *Code Civil* as result of the Napoleonic conquest nearly harmonised divorce law within the whole⁵⁰ Napoleonic Empire. Napoleon’s dream was ‘one European system, one European Code, one European Cassation Court’.⁵¹ However, the export of divorce law proved not to be equally successful everywhere. In Italy it appeared to be a dead letter even before its repeal.⁵² In contrast, it remained in force in the equally Catholic Belgium⁵³ and Luxembourg⁵⁴ even after its repeal in France in 1916. In Sweden the seeds of the Enlightenment fell on the fertile soil of its own rather liberal divorce tradition and law influenced by French Revolutionary legislation which survived the Reformation.⁵⁵

Partly due to Napoleon’s expansionist policy, the convergence tendency became more prominent during the period following the Enlightenment than during the preceding times. Although the Enlightenment, like the Reformation, was a pan-European phenomenon, its influence on marriage and divorce law was quite uneven. In some countries the ideas of Enlightened thinkers strongly influenced divorce legislation, like in Prussia, and even produced a short-lived liberal breakthrough which was far ahead of its time, like in France. Others, like most of the Catholic states⁵⁶ and England, remained almost immune, at least at the level of positive law.

⁴⁸ Glendon, M. A., ‘The French Divorce Reform Law of 1976’, *24 American Journal of Comparative Law*, 1976, p. 227.

⁴⁹ Rheinstein has rightly noted that ‘Napoleon’s Code hid breakdown behind consent’, as mere consent was not sufficient for divorce. Consent had to be able to prove ‘that life in common has become unbearable to the spouses’ (art. 233 CC). Rheinstein, M., *Marriage Stability, Divorce, and the Law*, The University of Chicago Press, Chicago, 1972, p. 212.

⁵⁰ Spain was almost the only exception where divorce was not introduced as it was contrary to tradition and practices. Phillips, R., *Putting asunder* (1988), p. 405.

⁵¹ *Propos tenus a Sainte Hélène*, cited by Baron Silvercruys in his speech during his inauguration as President of the French Constitutional Court. *Bull.*, 1930, p. 7.

⁵² Rheinstein, M., *Marriage Stability, Divorce, and the Law* (1972), p. 100.

⁵³ Dumon, W., Kooy, G., *Echtscheiding in België en Nederland*, Van Loghum Slaterus, Deventer, 1983, 13-14.

⁵⁴ NEYENS, M., ‘Entwicklungen in der luxemburger Familienrechtspolitik’, in: JANS, B. HABISCH, A., STUTZER, E., (eds.), *Familienwissenschaftliche und damiliernpolitische Signale*, Vektor-Verlag, Graftschaft, 2000, p. 616-617.

⁵⁵ See: WENDT, F., *The Nordic Council and Co-operation in Scandinavia*, Munksgaard, Copenhagen, 1959, p. 17.

⁵⁶ Some Catholic states were also influenced by the Enlightenment. In 1781 the Emperor Joseph II of Austria introduced civil marriage into Austria’s Italian territories and permitted non-Catholics there to divorce. In 1784 the same was permitted in the Austrian Netherlands (later Belgium). Phillips, R., *Putting asunder* (1988), p. 201.

The advance of Enlightenment ideas was, however, short-lived. The conservative wave of Reformation wiped away the divorce laws in France, Italy and Austria. Still, despite the changing tide, divorce remained a central issue in the political debate almost everywhere.⁵⁷ The whole century is coloured by the clashes between the ‘conservative-Christian’ and the ‘liberal-individualistic’⁵⁸ attitudes towards divorce.⁵⁹ Later on, judicial divorce on fault grounds was introduced in England in 1857⁶⁰ and restored in France in 1884.⁶¹ After the unification of Germany divorce by consent and on the ground of the breakdown of marriage previously existing in Prussia, and divorce by consent accepted in Prussia and in the Rheinland, were abolished⁶² so that only the fault-based divorce⁶³ survived in the *Bürgerliches Gesetzbuch (BGB)* of 1900.⁶⁴ The common tendency of that time was that most of divorce laws hardly became more permissive than a century before.

The Twentieth Century: ‘contemporaneity of the non-contemporaneous’⁶⁵

On the eve of the 20th century the common core of the positive law on divorce was, in the first place, the almost unanimous rejection of divorce by mutual consent.⁶⁶ The spouses’ autonomous right to decide to terminate their marriage, hesitantly recognised in some preceding divorce laws under the influence of the Enlightenment, was discarded and a ‘close statutory and judicial

⁵⁷ For instance in Italy, after the divorce that was briefly introduced by Napoleon was abolished in 1815, its restoration was continually debated and twelve divorce bills were presented to Parliament between 1878 and 1965. Sgritta, G., Tufari, P., ‘Italy’, in: Chester, P., *Divorce in Europe*, Nijhoff, Leiden, 1977, p. 255-526.

⁵⁸ Rheinstein, M., *Marriage Stability, Divorce, and the Law* (1972), p. 195.

⁵⁹ France was the clearest example of such clashes. Divorce was abolished there after the Reformation in 1816 ‘in the interest of religion, of morality, of the monarchy, of families’. After that time the ‘passionate propaganda’ for restoring divorce resulted in various bills, but they were ‘met by equal passionate counterattacks’. Rheinstein, M., *Marriage Stability, Divorce, and the Law* (1972), p. 214.

⁶⁰ See: Stone, L., *Road to Divorce. England 1530-1987* (1990).

⁶¹ Foyer, J., ‘The Reform of Family Law in France’ (1978), p.102-103.

⁶² When Germany was unified in 1871 a uniform law had to be enacted for the newly established state. To this end, irreconcilable differences between liberal the Prussian divorce law and the indissolubility of marriage in South Germany had to be reconciled. Despite the strong dominance of Prussia and the eagerness of Bismarck to roll back the influence of the Catholic Church, ‘the final form [of the Civil Code] favoured the conservative-Christian view rather than the liberal-individualistic tradition.’ Müller-Freinfels, W., ‘Family Law and the Law of Succession in Germany’, *14 International and Comparative Law Quarterly*, 1967, p. 434.

⁶³ The only exception being insanity.

⁶⁴ Müller-Freinfels, W., ‘Family Law and the Law of Succession in Germany’ (1967), p. 434.

⁶⁵ I am indebted for this metaphor to F. Rothenbacher. ‘Social Change in Europe and its Impact of Family Structures’, in J. Eekelaar, N. Thandabutu, *The Changing Family. International Perspectives on the Family and Family Law*, Hart Publishing, Oxford 1998, p21.

⁶⁶ Divorce by mutual concept, curtailed by restrictions, survived as a rare exception in the counties which retained the initial version of the Code Civil: Belgium and Luxembourg.

control’⁶⁷ over divorce was restored.’ The divorce laws of all the European countries permitting divorce only allowed it upon a number of specific grounds,⁶⁸ irretrievable breakdown as a general rule was unknown. The fault grounds clearly dominated the picture and the no-fault grounds were merely exceptions whose applicability was limited by cumbersome restrictions. Apart from these common features, the positive laws remained quite diverse as regards permissiveness, as the specific grounds varied from adultery alone (England) to a broad number of grounds including no-fault ones (Sweden)⁶⁹. Most Catholic countries still had no possibility for divorce at all.

Radical Reforms of the 1920s – First Appearance of Divorce on Demand

The beginning of the twentieth century witnessed radical reforms of divorce law in Scandinavia, the Soviet Union and Portugal. These regions were different in almost every aspect: religious and cultural, economic and social.

The first radical reform of divorce law occurred in Portugal in 1910 after the republican government had overthrown the king. The newly introduced divorce law⁷⁰ was rather liberal for that time and combined both fault and no-fault grounds, including divorce by mutual consent.⁷¹

In Scandinavia, the second region where divorce was liberalised, the previous divorce law was already rather permissive by European standards. In 1910 law commissions were appointed in Norway, Sweden and Denmark in order to work in close co-operation with each other.⁷² The new laws that resulted from this cooperation were very similar, if not identical.⁷³ The common feature was the introduction of irretrievable breakdown as a ground for divorce. The conditions under which it could be obtained were, however, not exactly the same.⁷⁴ In Norway, Denmark

⁶⁷ Phillips, R., *Putting asunder* (1988), p. 493.

⁶⁸ Neumayer, K., ‘General Introduction’, in: Chloros, A., (ed.), *The Reform of Family Law in Europe* (1978), p. 5.

⁶⁹ Divorce by Royal dispensation could, among others, be granted in Sweden when no fault was involved e.g. in case of ‘difference of temperament and opinion, which [...] turned into disgust and hatred’ between the spouses. Sellin, J., *Marriage and Divorce Legislation in Sweden*, University of Pennsylvania, 1922, p. 36-37.

⁷⁰ Decree 3 of November 1910 ‘Divorce Law’.

⁷¹ SOTTOMAYOR, M., ‘The Introduction and Impact of Joint Custody in Portugal’, *13 International Journal of Law, Policy and the Family* (1999), p. 247.

⁷² On the course of this Nordic cooperation see: David, ‘The International Unification of Private Law’, in: *International Encyclopaedia of Comparative Law*, vol. 2, 65, chapter 5, J.C.B. Mohr, Tübingen, 1971, p. 181- 185.

⁷³ According to Schmidt and Agell, ‘almost identical’. Schmidt, T., ‘The Scandinavian Law of procedure in Matrimonial Causes’, in: Eekelaar J.M., Katz N., (eds.) *The Resolution of Family Conflicts*, Butterworths, Harvard, 1984, p. 80; Agell, A., ‘Is There one System of Family Laws in the Nordic Countries’, *3 European Journal of Law Reform*, 2001, p. 314.

⁷⁴ Bradley, *Family Law and Political Culture, Scandinavian Laws in Comparative Perspective*, Sweet and Maxwell, London, 1996, p. 12.

and Sweden⁷⁵ the reforms were the result of co-operation between two dominant political movements: the liberal and the social democratic.⁷⁶ The liberal belief in the autonomous right of the spouses to decide for themselves whether and when their marriage had broken down⁷⁷ was clearly influencing Scandinavian law. Conservative opposition was also present,⁷⁸ but had less influence on the reforms than anywhere else in Europe.

The third region of early 20th century radical divorce reforms was the Soviet Union. Immediately after the Bolshevik revolution of 1917 the family law of Russia was drastically amended. The moderate conservative divorce law of the Russian Empire was replaced by legislation which, for the first time in European history since Roman times, introduced divorce on demand. The Decree of December 1917 and later the Family Code of 1918 provided for an administrative procedure without any inquiry in the case of a divorce by mutual consent. Court jurisdiction was retained for contested divorces, but no proof of the irretrievable breakdown of the marriage was required.⁷⁹ The second Russian Family Code of 1926 went even further and nearly equated the *de facto* marriage with the formal one. Consequently, divorce started to be regarded merely as a subsidiary means of terminating of both registered and informal marriages.⁸⁰ There was a consensus that the spouses could not be kept locked in marriage even if one of them was against divorce. The state withdrew from deciding upon the dissolution of marriage, leaving it to the autonomous decisions of the spouses themselves. A marriage was dissolved upon the request of one or both of the spouses to terminate the marriage; the registration of the divorce was no more than a formality. In line with this approach, the administrative procedure without any inquiry was extended to all divorce cases.

The place of the Soviet radical reforms in the overall development of family law in Europe was met with quite different appreciations among scholars. Some, like Rheinstein⁸¹

⁷⁵ In Finland the reforms were mainly the result of conservative policy. Bradley, D., 'Antecedents of Finnish Family Laws: Legal Traditions, Political Culture and Social Institutions', 2 *Legal History*, 1998, p. 98-110.

⁷⁶ Gaunt, D., and Nystrom, L., in: Burguiere, A., et al. (eds.). *A History of the Family*. Volume II. *The impact of Modernity*. Polity Press, Cambridge, 1996, p. 480. For a more extensive analysis see: Bradley, D., *Family Law and Political Culture. Scandinavian Laws in Comparative Perspective*, Sweet and Maxwell, London, 1996, p. 34- 63.

⁷⁷ According to Sellin, if the spouses had agreed that their marriage had failed 'the court has no right to inquire into the nature of the "discord", which brought the marriage to such an unhappy end', as "[n]o one knows the condition better than the spouses themselves." Sellin, *Marriage and Divorce Legislation in Sweden* (1922), p. 79.

⁷⁸ For the opposition to the reforms see: Bradley, *Family Law and Political Culture*. (1996), p. 22-24.

⁷⁹ Semidvorkin, N, *Sozdanie pervogo brachno-semeinogo kodeksa*, MGY, Moskow, 1989, p. 50.

⁸⁰ Art. 19 Family Code 1926.

⁸¹ Rheinstein, M., *Marriage Stability, Divorce, and the Law* (1972), p. 231-243.

considered these reforms to be merely excesses of the revolutionary period with rather limited significance. Others, like Phillips, suggested that the Soviet reforms had ‘an immediate and enduring impact in social and political thought in Western Europe’,⁸² as they translated into law the ideas of Western socialists on marriage, divorce, women, and the family’.⁸³ As I have argued elsewhere⁸⁴, this was not a ‘Bolshevik nonsense’ law. The core of the reforms was exactly in line with the general evolution of family law in Europe. It liberated family law from the patriarchal heritage and it temporarily introduced the concept of divorce on demand way ahead of time. In a sense, the Soviet law of the 1920s was the same kind of radical breakthrough as was the French revolutionary legislation of 1792. The clue to its significance is that the reforms were inspired not by the Bolsheviks or even socialist ideology alone, but by the ideas shared one way or another throughout the whole of the Russian and the European⁸⁵ progressive movement. It is possible to delineate three distinctive components of the ideological background of the reforms: radical secularism, liberal individualism and the socialists’ idea of the ‘dying out of the ‘bourgeois’ family’⁸⁶. Only the latter element was clearly the socialists’ own. The militant atheism of the Bolsheviks made the secularisation, longed for by many other leftists as well, excessive and drastic and ensured a sweeping break with the traditional Christian concepts of marriage and divorce. Liberal individualism was generally alien to Bolshevik ideology. It was, however, temporarily taken over from liberal thought and employed for reforming family law.⁸⁷ This reform, even after its partial repeal by Stalin in 1944, kept influencing not only the development of divorce law in Eastern Europe, but was also used as one of the models for the Swedish law of 1973.⁸⁸

⁸² Phillips, R., *Putting asunder* (1988), p. 534.

⁸³ Phillips, R., *Putting asunder* (1988), p. 514.

⁸⁴ Antokolskaia, M., ‘De ontwikkeling van het Russische familierecht vanaf de Bolsjewistische revolutie: een poging tot verklaring’, 70 *Tijdschrift voor Rechtsgeschiedenis*, 2002, p. 137-171.

⁸⁵ ‘Soviet family policy [...] found support – qualified and unqualified – across the liberal and socialist spectrum in Europe and America. It responded to liberal and socialist hostility to the oppressive character of bourgeois marriage, and complemented the socialist feminist critiques of Western family institutions and practices. In this sense the Soviet experiments [...] reinforced the individualistic tendencies of the Left’s analysis of the family.’ Phillips, R., *Putting asunder* (1988), p. 538.

⁸⁶ Outlined by Engels, F., in his *The Origin of the Family, Private Property and the State*, Penguin Books, Harmondsworth, Middlesex, 1985, p. 58-115.

⁸⁷ The similar confluence of liberal and social-democratic ideas in respect of family law occurred in Scandinavia in the 1920s. Bradley, D., *Family Law and Political Culture* (1996), p. 9-13.

⁸⁸ Sundberg, J., ‘Marriage or no Marriage. The Directives for the Revision of Swedish Family Law’, 20 *International and Comparative Law Quarterly*, 1971, p. 233.

After the radical reforms of the 1920s the divorce policies in Europe were subjected to significant ups and downs. Philips suggested a strong correlation between the political orientation of the regimes between the two World Wars and the attitude towards divorce.⁸⁹ Fascists and Pro-fascist regimes in Portugal⁹⁰, Spain⁹¹, Italy⁹² and France,⁹³ and communist regime in the Soviet Union⁹⁴ abolished or restricted divorce in their respective countries. In Portugal, Spain, Italy and France the restrictive divorce policies were linked to the eagerness of the right-wing governments to win the support of the Catholic Church. On the other hand, the conservative twist in divorce policy in the Soviet Union had nothing to do with religion. However, the association of conservative attitudes towards divorce with religion was so strong that Rheinstein was inclined to search for the roots of Stalin's counter-reform partly in the 'survival of Christian tradition'.⁹⁵ In my view this was not the case at all. Stalin's conservative policy could be perfectly explained in terms of 'purely secular statism'⁹⁶: the desire to roll back individual freedom and the shift of emphasis to the corporative element of the 'the socialist family', which had to be brought under more firm control by the totalitarian state.⁹⁷

Nazi Germany was in some respects a case apart. The Marriage and Divorce Act (*Ehegesetz*) of 1938⁹⁸ liberalised divorce law and provided for divorce on the ground of the irretrievable breakdown of marriage, alongside the old fault grounds. The German circumstances in some way resemble the Soviet reform of the 1920s: in both instances a totalitarian regime was responsible for liberal divorce reform. Just like the Russian divorce on demand was more than just

⁸⁹ Phillips, R., *Putting asunder* (1988), p. 534.

⁹⁰ The Portuguese Catholics were deprived of the right to divorce by the Concordat of 1940, which required them to renounce their right of divorce at the time of their marriage. OLIVEIRA, G., de, National Report for Portugal (2003), p. 47.

⁹¹ The promulgation of the law on divorce resulted in a bitter controversy between the socialists – republicans, on one hand, and conservative Catholics, on the other hand. However, in 1932 the Republican government managed to promulgate a liberal divorce law. LANGNER, D., *Eheschließung und Ehescheidung nach spanischem Recht*, Peter Lang, Frankfurt am Main, 1984, p. 9. The fascist government of Franco, which seized power in 1938, almost immediately repealed this law with retroactive affect.

⁹² The fascist regime of Mussolini abolished divorce even in territories, annexed after World War I, where it had been allowed for non-Catholics. Sgritta, G., Tufari, P., 'Italy', in: Chester, P., *Divorce in Europe*, 1977, p. 258.

⁹³ The Vichy government prohibited applying for divorce during the first three years of marriage. Foyer, J., 'The Reform of Family Law in France' (1978), p. 103.

⁹⁴ In 1944 Stalin's regime made divorce law less permissive (but still quite liberal, according to the average European standard of those days).

⁹⁵ Rheinstein, M., *Marriage Stability, Divorce, and the Law* (1972), p. 236.

⁹⁶ Rheinstein, M., *Marriage Stability, Divorce, and the Law* (1972), p. 236.

⁹⁷ See also: M. Antokolskaia, 'De ontwikkeling van het Russische familierecht vanaf de Bolsjewistische revolutie: een poging tot verklaring', *70 Tijdschrift voor Rechtsgeschiedenis*, 2002, p. 137-151.

⁹⁸ This law was also applicable in Austria which had been made a part of Germany at that time.

‘Bolshevik law’, the law of 1928 was not merely ‘Nazi law’. One of its principle sources was the ‘reform ideas developed during the 1920s not least of all by modern social investigations, undogmatic secular value judgements and comparative reference to the Scandinavian countries and Switzerland’.⁹⁹ However, the Nazi preoccupation with racial purity and eugenics was also discernible in the new German law.¹⁰⁰

Another important development was the growing accessibility of divorce due to the creeping relaxation of divorce law within the framework of fault-based divorce. In most of the European countries very undramatic changes in statutory or case law led to rather far-reaching consequences. They opened the gate to a notable discrepancy between divorce law in the books and its use in practice. As a result, the countries with restrictive divorce laws which solely provided for divorce upon a matrimonial offence found themselves confronted with the rise of mass consensual divorce by collusion.¹⁰¹

On the eve of the no-fault reforms the Western European countries had rather different divorce provisions but quite a similar problem: mass consensual divorce by collusion.

No-fault reforms of the 1960s-1970s

The 1960s witnessed profound cultural changes, in some respects comparable with the changes brought about by the French and Russian Revolutions. The traditional family values were no longer taken for granted and the traditional family pattern was challenged by both the sexual revolution, feminism and the re-emergence of individualism. In this new situation the reforming of divorce underwent a major change: if before this time the liberalisation of divorce law was

⁹⁹ Müller-Freinfels, W., ‘Family Law and the Law of Succession in Germany’ (1967), p. 412.

¹⁰⁰ Phillips, R., *Putting asunder* (1988), p. 550.

¹⁰¹ In France the false accusation of adultery was used as the shortest road to divorce, ‘Spouses agreed on divorce, they then invented fictitious grievances, wrote letters about false injuries, sometimes dictated by their respective lawyers, and the judges closed their eyes to the comedy.’ (Foyer, J., ‘The Reform of Family Law in France’ (1978), p. 106.) In England, the situation started to resemble the French since in 1923 wives obtained the possibility to apply for divorce on the ground of a simple case of adultery by the husband. (Stone, L., *Road to Divorce. England 1530-1987* (1990), p. 397.)¹⁰¹ Germany was ahead of the aforementioned countries, as it already had a mixed system of divorce based on fault and on the irretrievable breakdown of the marriage. However, another tendency manifested itself here. A divorce based on irretrievable breakdown without an allegation of fault was more cumbersome than divorce based upon a matrimonial offence. Thus in 80 to 90 percent of all divorce cases (Giesen, D., ‘Divorce Reform in Germany’, Giesen, D., ‘Divorce Reform in Germany’, *4 Family Law Quarterly*, 1973, p. 353.) the spouses did not wait for three years for no-fault divorce, ‘but looked for an easy and immediate divorce on the ground of some trumped-up matrimonial offence.’ (Müller-Freinfels, W., ‘Family Law and the Law of Succession in Germany’ (1967), p. 441.)

mainly a 'steady accumulation of specific grounds, often specific matrimonial offences and conditions,'¹⁰² now it took the shape of the introduction of the no-fault divorce.

The problem with divorce exclusively based on fault was not so much the hypocrisy surrounding the consensual divorce. The real trouble was with contested divorce. Firstly, the humiliating accusational procedure increased aversion and bitterness among the spouses and made their intimate life the subject of public scrutiny. Secondly, the 'guilty' spouse was, at least in theory, not entitled to obtain a divorce if an 'innocent' spouse opposed it. These inconveniences became less tolerable for the progressively minded populace in the revived spirit of individual freedom and the search for happiness and self-fulfilment typical for the new cultural climate of the 1960s. The right to dissolve an unhappy marriage was seen as a logical end of the right of every individual to seek happiness. From this individualistic perspective, the 'state had no right to prevent its citizens from perusing such happiness' and 'to make impossible or cumbersome the exercise of the natural right of divorce.'¹⁰³ The conservatives were concerned not so much with the hypocrisy of divorce by collusion, but with the ease of such divorce and the increase in the of the divorce rates. They still firmly believed that the State had 'an interest in the continuation of a marriage over and above the wishes of the parties involved',¹⁰⁴ and that the divorce law should ensure these interests. Thus the reforms of the 1960s-1970s were no less dominated by the progressive-conservative discord than was the case a century before.

In England divorce reform was preceded by two important reports: one¹⁰⁵ by the group appointed by the Archbishop of Canterbury¹⁰⁶, and another by the Law Commission.¹⁰⁷ Both the Law Commission and the Group of the Archbishop agreed that a matrimonial offence as the ground for a divorce should be replaced by the irretrievable breakdown of marriage. They also shared the objective that a good divorce law has to 'buttress rather than undermine the stability of marriage' and 'to enable the empty shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation.'¹⁰⁸ The groups differed, however, as to what

¹⁰² Phillips, R., *Putting asunder* (1988), p. 563.

¹⁰³ Rheinstein, M., *Marriage Stability, Divorce, and the Law* (1972), p. 196.

¹⁰⁴ Lee, B., *Divorce Reform in England*, Peter Owen, London, 1974, p. 198.

¹⁰⁵ *Putting Asunder: A Divorce Law for Contemporary Society* S.P.C.K., London, 1966.

¹⁰⁶ This was an enormous step on the part of the Church of England, which did not revoke its doctrine of the indissolubility of marriage, but generally acknowledged that the secular law may differ on this point from the law of the Church.

¹⁰⁷ *Reform of the Grounds of Divorce: The Field of Choice*, Law Commission, 1966, Cmnd 3123, No. 6.

¹⁰⁸ Law Commission, *The Field of Choice*, p. 10.

should be the role of the state in ascertaining such a breakdown. The Archbishop's Group rejected the very idea that the agreement of the spouses alone could be sufficient proof of the breakdown. According to its report, this 'idea would virtually repudiate the community's interest in the stability of marriage, because a judge (the community representative) would take no effectual part in the proceedings.'¹⁰⁹ Therefore the Group initially proposed a full inquest in every divorce case.¹¹⁰ The Law Commission considered such an inquest to be 'procedurally impracticable' and initially proposed that the evidence of the breakdown would be derived from the period of separation and the absence of evidence to the contrary.¹¹¹ The compromise reached between the two groups resulted in the Law of 1969: the breakdown without an inquest, but 'on proof of the existence of certain circumstances.'¹¹² As a result 'the practical proposals to implement this new principle [irretrievable breakdown] were as conservative as the idea itself was radical.'¹¹³ Three 'circumstances' were the same old fault grounds: adultery and cruelty (which was now called 'unreasonable behaviour') and desertion. In addition there were no-fault circumstances: two years of separation followed by an application for divorce by mutual consent, and five-years of separation followed by an unilateral application, contested by the other spouse. The strict control of divorce was reinforced by the introduction of a hardship clause.

In Germany it became widely agreed in the 1970s that the 'matrimonial offence principle has proved a failure', 'because it aggravates, rather than solves problems in many cases.'¹¹⁴ The principal debates¹¹⁵ concerned the same question as in England: what should be the role of the state in establishing the breakdown. Like in England, it was proposed to introduce the irretrievable breakdown with inquiry as a general rule.¹¹⁶ The Congress of Representatives of the German Legal Profession (*Deutscher Juristentag*) rejected the inquiry and therefore the general rule and proposed a fixed period of separation as proof of the breakdown.¹¹⁷ The resulting law

¹⁰⁹ Lee, B., *Divorce Reform in England* (1974), p. 51.

¹¹⁰ Lee, B., *Divorce Reform in England* (1974), p. 46.

¹¹¹ Law Commission, *The Field of Choice*, p. 53.

¹¹² Lee, B., *Divorce Reform in England* (1974), p. 73.

¹¹³ Stone, L., *Road to Divorce. England 1530-1987* (1990), p. 307.

¹¹⁴ Giesen, D., 'Divorce Reform in Germany', *4 Family Law Quarterly*, 1973, p. 353.

¹¹⁵ There were also more radical proposals from complete contractual freedom for the dissolution of marriage to divorce by mutual consent if certain conditions were satisfied. Giesen, D., 'Divorce Reform in Germany' (1973), p. 355.

¹¹⁶ Giesen, D., 'Divorce Reform in Germany' (1973), p. 355.

¹¹⁷ Giesen, D., 'Divorce Reform in Germany' (1973), p. 358.

was generally a compromise.¹¹⁸ Irretrievable breakdown became the sole ground for divorce. In the case of divorce by agreement, if the spouses had been separated for at least one year, then the breakdown was presumed. Giesen stressed that the only real purpose this one-year delay was ‘to serve the scruples of those who disapprove of divorce by mutual consent’, which remained highly controversial, as undermining the stability of marriage.¹¹⁹ The accessibility of divorce by agreement was restricted by the requirement that such agreement should include a proposal agreement on ancillary matters.¹²⁰ If the spouses had lived apart for three years, this constituted an irrefutable presumption of marital breakdown.¹²¹ However, a hardship clause allowed the court to postpone the dissolution of a marriage in exceptional circumstances.¹²²

When divorce reform started to be contemplated in France in the 1970s there were, according to Glendon, still ‘*les deux Frances*’.¹²³ The spirit of the French Revolution ‘was flourishing in some of the learned writings, and the divorce proposals of the socialist and communist parties were seeking to eliminate fault divorce completely and replace it with divorce for objective grounds.’¹²⁴ The conservatives opposed these ideas and the general public was hopelessly split.¹²⁵ Therefore a divorce law based solely on objective grounds was rendered impossible.¹²⁶ As a result, the French divorce law provided for a mixed system: *divorce à la carte*,¹²⁷ retaining the fault-based divorce alongside divorce by mutual consent and divorce on the ground of the irretrievable breakdown of a marriage proved by six-years’ separation.

Alongside the introduction of no-fault divorce in the countries with a more or less long-standing divorce tradition, no-fault divorce was adopted by some the countries which previously had no divorce at all. In Italy, Portugal (for the Catholics) and Spain divorce was reintroduced respectively in 1970, 1977 and 1981 based upon both fault and non-fault divorce. In contrast,

¹¹⁸ Müller-Freinfels, W., ‘The Marriage Law Reform of 1976 in the Federal Republic of Germany’, 28 *International and Comparative Law Quarterly*, 1979, p. 185.

¹¹⁹ Giesen, D., ‘Divorce Reform in Germany’ (1973), p. 358. The proponents of divorce by consent responded that one cannot ignore the importance to society of the institution of marriage; but, certainly, a marital union between two people does not exist for the sake of the institution.’ (Ibid, p. 361).

¹²⁰ Müller-Freinfels, W., ‘The Marriage Law Reform of 1976 in the Federal Republic of Germany’ (1979), p. 192.

¹²¹ Müller-Freinfels, W., ‘The Marriage Law Reform of 1976 in the Federal Republic of Germany’ (1979), p. 189.

¹²² Müller-Freinfels, W., ‘The Marriage Law Reform of 1976 in the Federal Republic of Germany’ (1979), p. 190.

¹²³ Rheinstein, M., *Marriage Stability, Divorce, and the Law* (1972), p. 195.

¹²⁴ Glendon, M. A., ‘The French Divorce Reform Law of 1976’, 24 *American Journal of Comparative Law*, 1976, p. 201.

¹²⁵ Glendon, M. A., ‘The French Divorce Reform Law of 1976’ (1976), p. 201.

¹²⁶ In Carbonnier’s words it was still feared as ‘divorce by repudiation, a tragedy for a wife, the object of horror for our Western societies.’

Ireland instantly embraced the principle of irretrievable breakdown of marriage in its law of 1996.

Quite out of pace with the rest of Europe, Sweden took a radical step in the liberalisation of divorce law by introducing divorce on demand. In the mid-1960s a ‘new radicalism’ had come to dominate Swedish politics.¹²⁸ The Swedish minister of justice laid down in the directive for the experts appointed to prepare the new legislation that ‘legislation should not under any circumstances force a person to continue to live under a marriage from which he wishes to free himself’.¹²⁹ The concept of fault also ought to disappear entirely from the Swedish divorce law’. The resulting law of 1973 provided that in the case of unilateral divorce or when the spouses had minor children, a divorce was to be automatically granted after a six-month period of reflection without any inquiry into the reasons for the divorce.¹³⁰ If both spouses agreed to divorce and no minor children were involved, a divorce had to be granted immediately.¹³¹ Although not everyone agreed with the ‘rationale that adult independent spouses do not need any time for reflection’,¹³² the adherence to spouses’ autonomy seemed to be not the only reason for the introduction of immediate divorce. Another more pragmatic reason was the competition between the institution of marriage and the greatly increased number of incidences of unmarried cohabitation, which could be cancelled without any delay and without any intervention by the state.¹³³ Thus, partly due to ideological, partly due to pragmatic reasons, the legislator patently broke with the traditional role of the state in granting a divorce and chose a non-interventionist policy.¹³⁴ As Bradley noted, it was conceded that ‘marriage and divorce law [...] *could* not influence behaviour and should not do so’.¹³⁵ The Swedish system openly left behind the concept of irretrievable breakdown and started to speak of divorce in terms of an entitlement and a

¹²⁷ Glendon, M. A., ‘The French Divorce Reform Law of 1976’ (1976), p. 199.

¹²⁸ Abstract of protocol in justice department matters, 15 Augustus 1969, p. 4. Cited in: Sundberg, J., ‘Marriage or no Marriage. The Directives for the Revision of Swedish Family Law’ (1971), p. 232.

¹²⁹ Abstract of protocol in justice department matters, 15 Augustus 1969. Cited in: Sundberg, J., ‘Marriage or no Marriage. The Directives for the Revision of Swedish Family Law’ (1971), p. 233-134.

¹³⁰ Lögdber, A., ‘The Reform of Family Law in the Scandinavian Countries’ in: Chloros, A., (ed.), *The Reform of Family Law in Europe* (1978), p. 203.

¹³¹ Lögdber, A., ‘The Reform of Family Law in the Scandinavian Countries’ (1978), p. 206.

¹³² Lögdber, A., ‘The Reform of Family Law in the Scandinavian Countries’ (1978), p. 206.

¹³³ Lögdber, A., ‘The Reform of Family Law in the Scandinavian Countries’ (1978), p. 206.

¹³⁴ The Introduction of divorce on demand signified a radical break with the traditional concepts of marriage and divorce and, somehow, revived the private and informal divorce from the times of classical Roma, which together with the Soviet reforms of the 1920s inspired the Swedish legislator. Sundberg, J., ‘Marriage or no Marriage. The Directives for the Revision of Swedish Family Law’ (1971), p. 233.

right.¹³⁶ It was also deliberately chosen not to base the legislation on a certain set of family values, but on respect for individual values of different couples.¹³⁷

Divorce on demand was also openly introduced in Finland in 1987.¹³⁸ As Finnish lawyers presented the situation: ‘the only “ground for divorce” is simply a request for a divorce by means of a written application by both spouses or by one of them renewed after a six-month mandatory period of reflection’.¹³⁹

Divorce on demand was indirectly introduced in Russia by the Family Code of 1995. Although the legal literature still speaks of the irretrievable breakdown of marriage,¹⁴⁰ in fact the joint request for divorce by the spouses is the true divorce ground in both the administrative and the judicial procedure (the latter is applicable when minor children are involved).¹⁴¹ In both cases neither the civil servant, nor the judge is entitled to make any enquiry into the reasons for the divorce and is obliged to grant a divorce one month after the application. The existence of divorce on demand in the case of a contested divorce is a matter of doctrinal controversy.¹⁴²

The fallacy of the fault-no-fault dichotomy

It is remarkable that the no-fault movement in the 1970s is repeatedly used both by proponents and by opponents of the convergence thesis in their advantage. On the one hand, the advance of no-fault divorce in the last half of the 20th century has been pointed to as evidence of convergence.¹⁴³ On the other hand, the existence of convergence is sometimes denied because, in

¹³⁵ Bradley, D., *Family Law and Political Culture*. (1996), p. 67.

¹³⁶ Bradley, D., *Family Law and Political Culture*. (1996), p. 71-72.

¹³⁷ According to the 1972 Proposal of the Committee on Family Law, ‘legislation on marriage should not contain laws of a specific, ethical nature, since ethical viewpoints could vary and the couples should be allowed to develop their relationship within their own individual assumptions and values.’ Agell, A., ‘Should and Can Family Law Influence Social behaviour?’ in: Eekelaar, J., Thandabutu, N., *The Changing Family International Perspectives on the Family and Family Law*, Hart Publishing, Oxford, 1998, p. 127.

¹³⁸ Bradley, D., ‘Politics, Culture and Family Law in Finland: Comparative Approach to the Institution of Marriage’, *12 International Journal of Law, Policy and the Family*, 1998, p. 294-304.

¹³⁹ Savolainen, M., National Report for Finland (2003), p. 78.

¹⁴⁰ Netchaeva, A., *Family Law (Semeinoe Pravo)*, Moscow, Jurist, 1998, p. 106.

¹⁴¹ Antokolskaia, M., *Family Law (Semeinoe Pravo)*, Moscow, Jurist, 1999, p. 128.

¹⁴² See: Antokolskaia, M., National Report for Russia (2003), p. 182-183.

¹⁴³ See: Neumayer, K., ‘General Introduction’, in: Chloros, A., (ed.), *The Reform of Family Law in Europe*, Kluwer, Deventer, 1978, p. 1.; Pintens, W., Vanwinckelen, C., *Casebook. European Family Law* (2001), p. 16; Phillips, R., *Putting asunder* (1988), p. 570.

spite of the similar general trend toward no-fault divorce, the results of these reforms were not exactly the same in every country.¹⁴⁴

The triumphal advance of no-fault divorce throughout Western Europe evoked the idea that Europe is moving towards a spontaneous harmonisation of family law.¹⁴⁵ In the beginning it looked indeed rather optimistic: in 1960 fault-based divorce existed in thirteen Western European countries, divorce upon the irretrievable breakdown of marriage in seven, and mutual consent divorce in six,¹⁴⁶ while four countries allowed no divorce at all. 'Twenty years later fault grounds had been retained in eight jurisdictions, and no-fault divorce had extended to twelve, as had mutual consent divorce.'¹⁴⁷ However, as the turn of millennium approached, the no-fault movement, gradually lost most of its vigour. The attempts to get rid of the fault grounds in England in Wales in 1996,¹⁴⁸ in France 2005,¹⁴⁹ and in Belgium¹⁵⁰ have failed. Two Eastern-European countries: Latvia,¹⁵¹ Lithuania¹⁵² have recently introduced fault grounds in their divorce law. This retroactive movement is consonant with the situation in regard of the covenant marriages in the US.¹⁵³

¹⁴⁴ Bradley, D., 'A Family Law For Europe? Sovereignty, Political Economy and Legitimation', in: Boele-Woelki, K. (ed), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, European Family Law Series No. 4, Intersentia, Antwerp, 2003, p. 72-79.

¹⁴⁵ Neumayer even spoke of 'entering into the period which is marked by a kind of *ius commune*'. Neumayer, K., 'General Introduction', in: Chloros, A., (ed.), *The Reform of Family Law in Europe* (1978), p. 1. In a similar sense see also: Pintens, W., Vanwinckelen, C., *Casebook. European Family Law* (2001), p. 16 and Phillips, R., *Putting asunder* (1988), p. 570.

¹⁴⁶ Phillips, R., *Putting asunder* (1988), p. 570.

¹⁴⁷ Phillips, R., *Putting asunder* (1988), p. 570.

¹⁴⁸ The long debated 1996 Family Law Act, which provided for no-fault divorce, has, to its largest part, never come into force. In 2001 the Government announced its decision to repeal it. (Lord Chancellor's Department, *Divorce Law Reform – Government Proposes to Repeal Part II of the Family Law Act 1996*.) For the history and context of the Act see: Cretney, S., Masson, J., Bailey-Harris, R., *Principles of Family Law*, Sweet and Maxwell, London, p. 304-308.

¹⁴⁹ After almost five years of debate about the future of French divorce law the fault ground was retained. In 2001 a group of left-wing MPs presented into the Assemblée nationale a Bill aimed at introduction of no-fault divorce (Préposition de loi relative à la réforme du divorce, document Assemblée nationale, N° 3189). The Bill was criticised in and outside Parliament and in 2002, when the left lost the majority in the Parliament, it was amended by the Senate in such manner that the fault-based divorce was retained (Project de loi relatif au divorce, document Sénat, No 389 présente à la session extraordinaire de 2002-2003, 9 July 2003). See: FERRAND, F., National Report for France (2003), p 60. The amended Bill became a Law on 26 May 2004 and came into force on 1 January 2005. For the content of the new law see: Bénabent, A., *La réforme du divorce article pas article*, Defrénois, Paris, 2004.

¹⁵⁰ In Belgium the discussion surrounding divorce reform is still in process, but it is getting more and more clear that the fault grounds will remain.

¹⁵¹ Introduced in 1993 by the restored Latvian Civil Code of 1937 (art. 71-72 and 74).

¹⁵² Introduced by art. 3.60 of the 2000 Civil Code of Lithuania (in force since 1 July 2001) KASERAUSKAS, Š., 'Moving in the Same Direction'? Presentation of Family Law Reforms in Lithuania' (2004). 330-331.

¹⁵³ Three American states, Louisiana (in 1991), Arizona (in 1999) and Arkansas (in 2001), have retreated from no-fault divorce by adopting legislation allowing a couple at the time of marriage to sign a 'covenant marriage'

A no-fault divorce - a divorce-remedy was such a change compared to the fault-based divorce sanction, that there was a strong temptation to keep viewing the map of European divorce law mainly in the light of the fault-no-fault dichotomy. However, with the time passing it appeared that reality is much more complicated. As long as many countries allowed divorce *exclusively* on the ground of fault, this approach had its merits, as in such a situation the ‘innocent’ spouse had no other option than an infringing accusational procedure while the ‘guilty’ spouse had no option at all except to purchase or coerce the cooperation of the ‘innocent’ party. Since nowadays not a single European country retains fault-based divorce as a sole ground,¹⁵⁴ the situation has utterly changed. The invocation of fault is now only one of the options among many, often providing the shortest route to a divorce.¹⁵⁵ Thus, although retaining fault grounds still has its symbolic meaning,¹⁵⁶ it no longer says a great deal about the divorce law of a particular country, and getting rid of such grounds does not automatically mean that divorce becomes any easier. The unsuccessful attempt to remove fault grounds in England and Wales¹⁵⁷ provides a good example. The current law offers the spouses the possibility to obtain a fault-based divorce within four to six months,¹⁵⁸ whereas the repealed provisions of The Family Law Act of 1996 made it impossible to obtain a divorce decree earlier than after a one-year period of ‘reflection’, which was to be extended by six months even for consenting spouses if they had children. In addition, although the Act removed the need to prove a reason for the breakdown of the marriage, the new system insisted that the

agreement, stating that they voluntarily restrict the grounds for possible future divorce to fault grounds. See: Maxwell, N., ‘Unification and Harmonisation of Family Law Principles: The United States Experience’, in: Boele-Woelki, K. (ed), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, European Family Law Series No. 4, Intersentia, Antwerp, 2003, p. 263-264.

¹⁵⁴ Martiny, D., ‘Divorce and Maintenance Between Former Spouses - Initial Results of the Commission on European Family Law’, in: Boele-Woelki, K. (ed), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, European Family Law Series No. 4, Intersentia, Antwerp, 2003, p. 534.

¹⁵⁵ Cretney, S., Masson, J., Bailey-Harris, R., *Principles of Family Law* (2002), p. 299, note 95.

¹⁵⁶ During the Parliamentary debates on the eradication of fault from English divorce law one of the main opponents in the House of Lords, Baroness Young, said that: ‘The message of no fault is clear. It is that breaking marriage vows, breaking a civil contract, does not matter. It undermines individual responsibility. It is an attack upon decent behaviour and fidelity. It violates common sense and creates injustice for anyone who believes in guilt and innocence’, *Hansard (HL)*, vol 569, col 1638. Similar criticism met the French Bill designed to introduce no-fault divorce. See: Mahe, C., ‘De Franse wetgever op weg naar afschaffing van “schuldscheiding”, *1 Tijdschrift voor Familie- en Jeugdrecht*, 2002, p. 20-22.

¹⁵⁷ See: Cretney, S., Masson, J., Bailey-Harris, R., *Principles of Family Law* (2002), p. 197-309.

¹⁵⁸ *Fourth Annual Report of Advisory Board in Family Law*, 2000/2001, para 3.5. Cited in: Cretney, S., Masson, J., Bailey-Harris, R., *Principles of Family Law* (2002), p. 299, note 95.

couple should settle ancillary matters beforehand, ‘which may be much harder than proving adultery, behaviour or separation.’¹⁵⁹

What’s in a Name? Looking Through the Concept of Irretrievable Breakdown

The most recent survey of the current divorce law in Europe provided by the *CEFL National Reports*,¹⁶⁰ reveals a phenomenon, which, paraphrasing Zweigert and Kötz, can be called ‘functional disequivalence’. It is easy to see that, confusingly enough, under one and the same designation of ‘irretrievable breakdown’¹⁶¹ virtually every type of divorce can be hidden, from fault-based (England and Wales, Scotland, Greece and partly also Poland and Bulgaria) to divorce by consent (The Netherlands, Russia). If we look beyond these labels, we can roughly distinguish five more or less pure functional types of divorce grounds: fault-based grounds, irretrievable breakdown in the narrow sense of this term, divorce on the ground of separation¹⁶² for a stated period of time, divorce by consent and divorce on demand.

The fault-based divorce in theory presupposes a court enquiry into a matrimonial offence, but the strictness of this inquiry has been watered down over the course of time. For instance, in England and Wales, the so-called special procedure under which undefended divorces are granted without any court hearing¹⁶³ more resembles an administrative divorce others than the old-fashioned divorce trials. That, combined with the possibility to obtain divorce immediately, sometimes makes fault-based divorce an attractive form, even for consenting spouses.

Divorce upon an irretrievable breakdown in the narrow sense is granted upon the subjective criterion alone: when the court is convinced that that marriage cannot be saved (Bulgaria, Czech Republic, The Netherlands, Poland, Hungary etc.), or upon the subjective as well as the objective criterion: a certain period of separation (four years in Ireland, three years in Austria, two years in Belgium etc.). In the jurisdictions that prescribe the subjective criterion alone, the court inquiry is nearly a dead letter in non-contested cases; however, in contested cases

¹⁵⁹ Hale, B., ‘The Family Law Act 1996 – the death of marriage?’ in: Bridge, C., *Family Law Towards the Millennium: Essays for P M Bromley*, Butterworths, London, 1997, p. 9.

¹⁶⁰ See note 8.

¹⁶¹ On the analysis of the grounds for the breakdown of marriage as it is apparent from the *CEFL National Reports* see: Martiny, D., ‘Divorce and Maintenance Between Former Spouses - Initial Results of the Commission on European Family Law’ 2003, p. 537-540.

¹⁶² The term separation is used to denote the variable concepts of cessation of marital life as used in different jurisdictions.

it may be quite intrusive, especially in countries like Bulgaria and Poland where allocation of the fault is required.¹⁶⁴ In the jurisdictions that combine subjective (convincing the court or other competent authority) and objective (period of separation) criteria, proving the breakdown is twice as difficult, as even after the stated period of separation has expired, the court could refuse a divorce if it is not convinced that the marriage has irretrievably broken down.

The jurisdictions where divorce is to be granted after the simple expiry of the stated period of separation often call this an irrefutable presumption of the irretrievable breakdown of a marriage, but sometimes consider it a separate ground (Norway). In both cases, however, a divorce is granted automatically and without further inquiry. The accessibility of divorce basically depends on the length of the separation period. These periods vary quite significantly: six years in Austria, England and Wales and in Scotland, four years in Switzerland and Greece, three years in Italy and Portugal, two years in Germany and France and one year in Denmark, Norway and Iceland. As in most of the jurisdictions these periods are rather lengthy, this form of divorce is not really attractive if a shorter route is available to the spouses.

Divorce by consent is in some jurisdictions covered under the designation of irretrievable breakdown, and constitutes an irrefutable presumption thereof (e.g. Austria, Czech Republic, Denmark, Germany, The Netherlands, England and Wales, Russia, Scotland). In other countries consent is presented as a separate ground (Belgium, Bulgaria, France, Greece, Portugal). In both cases the court with competent authority grants divorce automatically and without inquiry into the reasons for divorce if the spouses have agreed thereon. However, most of the states still consider divorce by consent as dangerously diminishing the state control of divorce. The multiple restrictions of the right of divorce by consent often make it a less attractive and speedy form of divorce. Only Dutch and Russian law allows divorce on the ground of simple consent without any further restrictions. In some countries the marriage has to be of a certain duration: three years in Bulgaria, two years in Belgium, one year in Czech Republic and Greece. Other countries allow consensual divorce only after a certain period of separation, two years in England and Wales and in Scotland, one year in Germany and six months in Denmark, Czech Republic and Iceland. In most countries (Austria, Belgium, Bulgaria, Greece, Germany, Hungary, Denmark,

¹⁶³ Cretney, S., 'Divorce Reform in England: Humbug and Hypocrisy or a Smooth Transition?', in: Freeman, M., (ed), *Divorce: Where Next*, Dartmouth, Aldershot, 1996, note 19, p. 56.

¹⁶⁴ Todorova, V., National Report for Bulgaria (2003), p. 406-408; Mączyński, A., Sokołowski, T., National Report for Poland in: *Grounds for Divorce* (2003), p. 194.

Portugal) an agreement to divorce alone is not sufficient and the spouses are required to reach an agreement on ancillary matters as well. This list of restrictions reveals that most of the countries are still reluctant to recognise the autonomous decisions of the spouses alone as a sufficient ground for divorce. The state in one way or another has to protect the spouses from their own 'inconsiderate',¹⁶⁵ decisions.

Divorce on demand where each of the spouses is simply considered to be entitled to divorce, irrespective of the objections of the other spouse, is explicitly recognised in Sweden and Finland and, perhaps, indirectly in Russia. This is, beyond doubt, the easiest form of divorce, fully respecting the autonomous decisions of the spouses (one of them) and accepting as a fact that the state is not capable of keeping marriage intact against the will of even one of the spouses. The only state intervention in this kind of divorce is a short waiting period of six months for contested divorces or divorces with minor children in Sweden and for all divorces in Finland, and a possibility of a three-month reconciliation period for contested divorces under Russian law.

Many countries have not just one, but multiple grounds for divorce. In this case especially the consenting spouses have the possibility of a kind of 'ground shopping'. Empirical data seems to suggest that spouses, assisted by their lawyers, are always able to choose the shortest way to divorce as water will always find its way to the lowest point.¹⁶⁶

This rough survey illustrates that if, in spite of all the optimistic expectations from the no-fault reforms, no substantial common core has so far emerged. Even if the fault grounds would completely disappear from the picture in the foreseeable future, this event alone would not significantly increase the scope of the common core.

Conclusion: is there a convergence tendency or not?

The history of divorce law during the last half-millennium clearly shows a general development of divorce law in Europe in the same direction: from more restrictive to more permissive.¹⁶⁷ It is

¹⁶⁵ Martiny, D., 'Divorce and Maintenance Between Former Spouses - Initial Results of the Commission on European Family Law' (2003), p. 536. Martiny also notes that 'consent seems to be a dangerous kind of marriage dissolution'. Ibid.

¹⁶⁶ For instance, in England and Wales 68.6 % are granted upon fault grounds. (Lowe, N., National Report for England and Wales in: *Grounds for Divorce* (2003), p. 103), as this proves to be the shortest route to a divorce. see note 155.

¹⁶⁷ See also H. Willekens: 'Changes in different legal systems do not take place simultaneously nor at the same pace, but when change occurs the direction is always the same'. 'Explaining Two Hundred Years of Family Law in

also visible that the choices, the ideological background and the political colour of the principle participants in the divorce debates are the same everywhere. This overall development towards modernisation has been perceived by some proponent of convergence as the evidence of convergence on a general level.¹⁶⁸ At the same time, the fact that there has always been a significant divergence in the profundity and pace of modernisation of family laws from one European country to another, has been used by the opponents of the convergence theory as evidence that family laws do not converge. It is important, however, to keep in mind a clear distinction between two questions: whether or not there is a tendency towards modernisation of divorce laws in Europe; and whether or not there is a tendency towards convergence of divorce laws. Considering the history, the general movement towards modernisation undeniably exists. But this does not necessarily implies a tendency towards convergence. The established the existence of convergence one must manage to prove that, while the divorce laws of the European countries are moving in the same direction, the differences between those laws are steadily diminishing in the course of the time. On a short-term basis certain periods of convergence of divorce law can certainly be discerned. The expansion of Napoleon's divorce law in the early eighteenth century, or the recent spontaneous no-fault movement, provide good examples thereof. A more broad historical perspective however, reveals that on the long-term basis there is no indication that the level of similarity of divorce laws became higher in our times, than it was, let's say, a hundred-fifty years ago. Let me give an illustration. In the mid-nineteenth century a considerable number of European countries admitted no divorce at all. The majority of European countries provided for divorce on a limited number of predominantly fault grounds. No-fault grounds, like irretrievable breakdown or consent, were mere exceptions. Divorce was rare and quite difficult to obtain. Today the picture is rather different. Malta, the only European country that does not provide for a full divorce, can be seen as a mere relict. Fault grounds are still present in a considerable minority of divorce laws, but no European country maintains fault as the sole divorce ground. The liberalisation of divorce throughout the analysed period is therefore manifest. There is, however, no evidence that the

Western Europe' (1997), p. 60. See in the same sense also my 'Development of Family Law in Western and Eastern Europe: Common Origins, Common Driving Forces, Common Tendencies' (2003), p. 52-69.

¹⁶⁸ I defended this view earlier in my previous works: 'Geschiedenis van het familierecht: gelijke ontwikkeling' (1999); p. 33-65; 'Gezamenlijke tendensen en beginselen' (1999); p. 65-81; 'The Process of Modernisation of Family Law in Eastern and Western Europe: Difference in Timing, Resemblance in Substance' (2000); 'Development of Family Law in Western and Eastern Europe: Common Origins, Common Driving Forces, Common Tendencies' (2003), p. 52-69.

differences between the divorce laws in the beginning of the period were greater than at the end thereof. The current map of divorce laws in Europe shows that these laws encompass all generations: fault-based divorce; divorce due to irretrievable breakdown; divorce by consent and divorce on demand. One hundred-fifty year ago the most conservative countries did not allow divorce at all, while the most progressive countries provided for divorce by mutual consent or irretrievable breakdown, albeit surrounded by numerous restriction. In our days the most conservative county: Malta still has failed to introduce divorce. Even if we leave Malta aside, there is a major difference between, for instance, the Irish law, on one hand, where the spouses have to wait for a divorce for four years and even then the court is entitled to refuse the divorce if it is not convinced that the breakdown of the marriage is irretrievable or that the financial provisions for the spouse and any dependent members of the family are sufficient,¹⁶⁹ and the Swedish immediate divorce on demand, on the other hand. This difference exists not just on the level of positive law, but also on a deep ideological level.¹⁷⁰ Thus the common core of divorce law in Europe is at the current stage probably even more limited,¹⁷¹ than it was hundred-fifty year ago. The explanation is that, although the tendency towards modernisation of divorce influences every European country, the pace of proceeding from stage to stage within the progressive development of divorce law is different.¹⁷² This difference in pace seems to be a permanent factor. The historical sketch above shows that while the countries that render behind make a step towards modernisation of family law (e.g introducing no-fault divorce), the vanguard countries make a further step forward (like introducing divorce on demand) so that the gap between them persists. When Phillips systematised divorce law in 1986, he felt that the newly introduced extremely permissive Swedish divorce law did not fit within his scheme. What he then perceived as breaking ‘with the trend toward divorce law uniformity in Western Europe’,¹⁷³ was in fact the

¹⁶⁹ Shannon, J., National Report for Republic of Ireland (2003), p. 84-86.

¹⁷⁰ As Glendon has rightly mentioned, a legal system that requires a spouse to wait for several years for a divorce [...] is obviously promoting a different ideology on marriage from that fostered in a country where divorce is available on one party’s demand in a year or less’. *The Transformation of Family Law*, The University of Chicago Press, Chicago and London, 1989, p. 192.

¹⁷¹ Bradley has rightly predicted such an outcome. Bradley, D., ‘A Family Law For Europe? Sovereignty, Political Economy and Legitimation’ (2003), p. 97.

¹⁷² Already in the 1980s Phillips noticed: ‘Needless to say, these pressures and reforms were far from uniform throughout Western society. They went further in Scandinavia, especially Denmark and Sweden, [...] but countries such as Spain and the Republic of Ireland lagged behind the trends elsewhere. Phillips, R., *Putting asunder* (1988), p. 561.

¹⁷³ Phillips, R., *Putting asunder* (1988), p. 571.

beginning of a new generation of divorce laws: divorce on demand. The well-known paradox of Zeno asks whether or not Achilles could overtake a tortoise, but it is quite clear that a tortoise could hardly ever overtake Achilles, unless it suddenly gets wings. In the field of divorce law there are some historical examples of tortoises suddenly getting wings and overtaking Achilles. Such were the breakthroughs in modernisation of divorce law after the Russian and Portuguese revolutions. But these are more exceptions than rules. Normally the tortoises (generally the South European countries plus Ireland) remain slow and the Achilleses (e.g. the Scandinavian countries and Russia) keep moving fast. While the countries lagging behind in the liberalisation of divorce are approaching one stage, the vanguard has already moved to the next, and in this way the distance persists and the common core on the level of positive law remains limited.